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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2004

Case No.: TIA-0255

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late mother (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an

application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a clerk at the DOE's Oak Ridge K-25 plant during 1945. The Worker died in 2003, at the age of 80. The Applicant filed Subpart B and Subpart D applications, claiming that the Worker died from lymphoma and lung cancer and that those illnesses were related to toxic exposures at DOE. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have her Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination. The Panel stated that the Worker was employed at the site for four months, from June 1945 to October 1945. The Panel found that the Worker had one illness, lymphoma; the Panel stated that the claimed lung cancer was also lymphoma. Based on the clerical nature of the Worker's position and the absence of any evidence of exposures, the Panel found that the Worker's illness was not related to her DOE employment.

The Applicant filed an appeal. The Applicant argues that (i) the Worker's autopsy identified the lung cancer as a separate primary

cancer, (ii) the Worker was employed at the site for eight months, rather than four months, and (iii) the absence of documented exposures should not result in a negative determination.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the Worker's lung cancer was a separate cancer does not indicate Panel error. The Panel cited the autopsy report's finding of "lung tissue and spleen malignant lymphoma," as meaning that the cancer in the lung was lymphoma, not a separate primary cancer. The Applicant has not provided any medical opinion to the contrary.

The Applicant's argument that the Worker was employed for eight months is not substantiated. The Applicant has documented one additional month of employment, May 1945. This difference is not significant. The Panel's determination turned on the clerical nature of the Worker's employment and the absence of any evidence of exposures. Accordingly, the one-month difference is harmless error.

Finally, the Applicant's argument that the absence of documented exposures should not result in a negative determination ignores the applicable standard. The Panel was required to apply the standard set forth in the Rule. The Rule did not require the Panel to rule out the possibility of exposures. Instead, the Rule required that the Panel consider whether "it is at least as likely as not" that toxic exposures at DOE were "a significant factor" in the illness. The Panel applied that standard here and found that the nature of the Worker's employment and the absence of documented exposures indicated that no exposures occurred. Accordingly, the Applicant's argument does not indicate Panel error.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the

DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0255, be, and hereby is, denied.
- (2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005